No. 00-1459

Supreme Court, U.S.
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In The

Supreme Court of the United States

SOUTHWEST MARINE, INC.,

Petitioner,

v.

SAN DIEGO BAYKEEPER, NATURAL RESOURCES DEFENSE COUNCIL and KENNETH J. MOSER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the District Court's finding that Respondents' citizen suit notification letter alleging multiple violations of the Clean Water Act ("CWA") satisfied the jurisdictional prerequisites established by 33 U.S.C. § 1365(b)(1)(A) where the pre-suit notice letter not only set forth all of the information called for by the applicable regulations, but where Petitioner *conceded* in the appellate court that many of the allegations in the notice letter were adequate to satisfy the requirements of the CWA and where Petitioner actually *did* understand the allegations contained in the notice and attempted to remedy some of the violations of which Respondents had complained?

2. Whether the Court of Appeals properly held that the District Court did not abuse its broad discretion in fashioning equitable relief, where, upon finding that Petitioner had violated and was continuing to violate its NPDES permits and the CWA by not adequately implementing its pollution prevention plans, the District Court issued a narrowly-tailored injunction that was reasonably calculated to achieve compliance with the CWA and to enforce the terms of Petitioner's permits by mandating certain specific remedial actions that were completely consistent with, and complementary to, those existing permit requirements?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Natural Resources Defense Council, Inc., is a New York non-profit corporation, with no parent companies or subsidiaries. Respondent San Diego BayKeeper, Inc., is a California non-profit corporation, with no parent companies or subsidiaries. No parent company or publicly held company owns 10% or more of the Respondents' stock.

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STATEMENT OF THE CASE

Respondents concur with Petitioner Southwest Marine, Inc.'s recitation of the Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved. The regulatory background and history of this litigation are fully and accurately set forth in the Court of Appeals' comprehensive opinion. Appendix to Petition ("Pet. App."), 2a-10a, reported at *Natural Resources Defense Council et al. v. Southwest Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000).

REASONS FOR DENYING THE WRIT

This petition for a writ of certiorari seeks review of the unanimous decision of the Ninth Circuit Court of Appeals (Judges Kozinski, Graber and Fisher) culminating almost five years of litigation by Respondents Natural Resources Defense Council, San Diego BayKeeper, and Kenneth Moser ("Respondents") under the citizen suit provisions of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1386, against Petitioner Southwest Marine, Inc. ("Southwest" or "Petitioner"), the largest non-nuclear shipyard in the country. The gist of Respondents' enforcement action under the CWA was that Petitioner's statutorily mandated pollution prevention plans, although nominally in existence, were legally inadequate and were not being implemented so as to reduce and eliminate pollution of San Diego Bay, as required by law.

This case was closely supervised in the trial court by United States Senior District Judge Rudi M. Brewster, who visited the shipyard on three occasions, actively

presided over a three-and-a-half-week bench trial, and concluded that Southwest's violations of law were polluting San Diego Bay to the extent of creating a "dead zone" that was "devoid of life." After balancing the appropriate factors, Judge Brewster imposed a civil penalty against Southwest pursuant to 33 U.S.C. § 1319(d) and ordered a variety of site modifications, operational changes, and inspection and monitoring practices designed to remedy Southwest's violations of the CWA and to ensure compliance with the relevant requirements of its National Pollutant Discharge Elimination System ("NPDES") permits and plans. The District Court's judgment (together with its order temporarily staying a limited portion of that judgment) was unanimously affirmed by the Ninth Circuit Court of Appeals, which rejected Petitioner's multiple claims of error, including its challenges not only to the District Court's rulings on the adequacy of notice and the appropriateness of the injunctive relief ordered, but also to Respondents' standing, to the court's subject matter jurisdiction, to the evidence of ongoing violations at Petitioner's facility, and to the amount of the civil penalty imposed on Southwest for the violation of its permit conditions.[1]

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[1] Southwest subsequently filed yet a third appeal in this case, challenging the propriety of the District Court's order modifying some of the terms of its injunction while Southwest's initial appeals were pending. That appeal was heard by an entirely different panel of the Ninth Circuit Court of Appeals (Judges Canby, Thompson, and Pregerson), which unanimously rejected Petitioner's arguments as well. *See Natural Resources Defense Council et al. v. Southwest Marine, Inc.*, 242 F.3d 1163 (9th Cir. 2001).

The petition for a writ of certiorari in this case raises no issue meriting this Court's review. The opinion of the Court of Appeals below breaks no new legal ground, but merely applies established precedents to the peculiar factual circumstances of Petitioner's shipyard facility and the narrative provisions of its Clean Water Act permits. Petitioner Southwest does not even attempt to argue that there is a conflict among the circuits on any issue presented, because plainly no such conflict exists. Nor, despite Petitioner's overblown rhetoric, does the petition raise any questions of national significance in the administration of the Clean Water Act. Southwest can point to no recurring or widespread impact from the Court of Appeals' fact-bound decision other than Petitioner's own exaggerated and unsupported claim that the decision below "eviscerates the citizen suit notice requirement and upsets the balance carefully struck by Congress between public and private enforcement of the Clean Water Act." Petition ("Pet."), at 18.

Southwest nevertheless insists that its petition for a writ of certiorari should be granted because the Court of Appeals' opinion supposedly conflicts with this Court's prior precedents under the Clean Water Act and other similar federal environmental statutes. But the cases from this Court upon which Southwest bases its claimed conflicts do not in any way support Petitioner's arguments. With respect to the adequacy of the pre-suit notice letter, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52-53 (1987), does not even address the question, whereas *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989), involved a failure of the plaintiffs to provide *any notice whatsoever* to the government enforcement

agencies until after suit had been commenced. To argue that the Court of Appeals' decision in the present case – in which Respondents indisputably provided a detailed pre-suit notice letter to all of the requisite entities – somehow conflicts with this Court's rulings in *Gwaltney* or *Hallstrom*, stretches the holdings of those cases beyond reason.

Similarly, on the issue of the trial court's equitable jurisdiction, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 318 (1982), and more recently *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 193 (2000), affirm the District Court's broad equitable discretion to remedy proven violations of the Clean Water Act. The principal cases urged by Southwest to conflict with the Court of Appeals' decision below, *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981), and *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), held that the Clean Water Act preempted the federal and state common law of nuisance; again, those decisions did not even address the scope of a federal court's equitable powers under the Clean Water Act – the question presented here – much less resolve that issue in any way that was inconsistent with the Court of Appeals' opinion in this case.

In sum, Petitioner has vainly attempted to concoct cert-worthy legal issues out of what are, at bottom, heavily fact-bound and mundane disputes over the adequacy of Respondents' notice letter and the reasonableness of some of the terms of the trial court's remedial injunction. The District Court and the Court of Appeals properly resolved these disputes in Respondents' favor and adversely to Petitioner. But even if this diverse group of judges could somehow be said to have erred in their

application of the law to the specific facts of this case, there is nothing in the Court of Appeals' unanimous opinion that warrants further review by this Court. Granting the petition for a writ of certiorari would only prolong a case that has already dragged on for far too long, fueled by a dissatisfied, intractable litigant. The petition should be denied.

I. THE COURT OF APPEALS' DECISION UPHOLDING THE ADEQUACY OF RESPONDENTS' PRE-SUIT NOTICE LETTER IN NO WAY CONTRAVENES THE CLEAN WATER ACT OR THIS COURT'S PRECEDENTS.

A. Respondents' Pre-Suit Notice Letter Included All of the Requisite Information Regarding the Specific Activities Alleged To Constitute the Violations of Petitioner's NPDES Permits.

Petitioner contends that the Court of Appeals' decision upholding the sufficiency of Respondents' notice letter cannot be reconciled with the requirements of the Clean Water Act and its implementing regulations or with this Court's precedents involving the citizen suit notice provisions contained in many federal environmental statutes. Specifically, Petitioner contends that Respondents' notice letter was "completely devoid of any information about the actual activities that respondents believed to constitute a violation of petitioner's NPDES permits" (Pet. at 11), that it did not "give EPA and the prospective defendant fair warning of what the case will be about" (*id.* at 14), and that consequently the notice letter did not fulfill the objectives of Congress in imposing the 60-day notice requirement, as identified by this Court in

Gwaltney, 484 U.S. at 52-53 and *Hallstrom*, 493 U.S. at 29. Pet. at 14.

Both the District Court and the Court of Appeals properly rejected Petitioner's challenge to the adequacy of the Respondents' 60-day notice letter, finding that the notice satisfied the statutory conditions of 33 U.S.C. § 1365(b)(1)(A) and the EPA's implementing regulations, which require that the notice "shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, [and] the activity alleged to constitute a violation. . . . " 40 C.F.R. § 135.3(a).

Aside from identifying, by both citation and title, the specific provisions of the Clean Water Act and the two NPDES permits that Petitioner was alleged to be violating (Pet. App. 28a-35a), the notice letter advised that Southwest had failed to develop and implement a Storm Water Pollution Prevention Plan ("SWPPP") in accordance with Part C.2 and Section A of its 1992 General Industrial NPDES Permit, which requires that storm water plans be developed and implemented with the "Best Available Technology Economically Achievable" for toxic and nonconventional pollutants ("BAT"), and with the "Best Conventional Control Technology" ("BCT") for conventional pollutants.[2] *See* Pet. App. 34a-35a (Notice Letter Attachment 2); Appellant's Excerpts of Record ("ER") 118-120

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[2] Rather than relying on numeric effluent limitations, Petitioner's Clean Water Act permits require the company to develop and implement Best Management Practices ("BMPs") "to prevent or reduce the pollution of waters of the United States." 33 U.S.C. § 1314(e); 40 C.F.R. § 122.2. As the Court of Appeals noted, BMPs are narrative limitations employed when

(1992 General Industrial NPDES Permit, Section A); 33 U.S.C. §§ 1311(b)(2)(A) & (E).

The notice letter specifically alleged that Southwest's shipyard had failed to implement certain Section A.5 stormwater management controls appropriate for the facility, including not only "good housekeeping" controls,[3] but also preventive maintenance, spill prevention and response, storm water management practices, erosion and sediment controls, and inspections. Pet. App. 34a. For each of those referenced controls, Section A.5 identifies specific pollution management practices that are required. ER 119-120 (1992 General Industrial NPDES Permit, Section A.5). For example, the "Good Housekeeping" permit provision specifically required the maintenance of clean and orderly facility areas through regular inspection and cleaning (Section A.5.c); "Preventive Maintenance" required inspection and maintenance of stormwater conveyance systems and inspection and testing of all systems that could fail and allow discharge of

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numeric effluent limitations are infeasible. Pet. App. 34a; *see Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977).

[3] Southwest concedes that good housekeeping is "[p]aramount in the application of storm water pollution prevention . . . [and that the shipyard] relies heavily upon good housekeeping procedures to ensure that storm water which flows from the surfaces of the shipyard are pollutant free to the maximum extent possible." Appellees' Supplemental Excerpts of Record ("SER") 125 (Southwest's 1998 BMP Program Manual, BMP-101 "Good Housekeeping"). However, the "Good Housekeeping" provision was by no means the only provision of Petitioner's permits referenced in Respondents' notice letter that corresponds to the District Court's findings of violations.

pollutants to storm water (Section A.5.b); "Storm Water Management Practices" required material handling and clean-up procedures, and assessment of the necessity of additional controls (Section A.5.e); and "Inspections" required performance of all required inspections, and tracking and follow-up procedures to ensure appropriate response action is taken (Section A.5.h). *Ibid.*

Respondents' letter also alleged that Petitioner had failed to adequately develop and implement a Storm Water Pollution Monitoring Plan ("SWPMP") in accordance with Part C.3 and Section B of its 1992 General Industrial NPDES Permit. Pet. App. 35a. Respondents alleged Petitioner's failure to conduct required annual site inspections (Section B.5.a), to conduct visual observations of all stormwater discharge locations during the first hour of each significant stormwater discharge event per month (Section B.5.c), to analyze for toxic pollutants likely to be present in stormwater runoff (Section B.5.d.ii.), to collect samples from all discharge locations, or to establish similarity between them (Section B.11), and to notify the Regional Board of any non-compliance (Section B.17). *Ibid.* Petitioner was also notified that its stormwater discharges were adversely impacting the environment in violation of Part B.1 of its 1992 General Industrial NPDES Permit.[4] Pet. App. 34a.

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[4] Petitioner falsely accuses the Court of Appeals of resting its opinion upholding the adequacy of Respondents' notice in this case on "one isolated phrase in Attachment 2 to the notice letter" – the "good housekeeping" requirement. Pet. at 12-13. The notice letter, however, plainly alleges 7 other specific types of storm water management control deficiencies (Pet. App. 34a) and 6 specific types of inspection and monitoring deficiencies

Respondents' notice letter thus contained sufficient information to advise both Southwest and the appropriate government enforcement agencies of the specific activities – or, perhaps more properly in this case, the specific *inactivities* – that were alleged to constitute a violation of the CWA and of Southwest's NPDES permit requirements. Significantly, the letter did not incorporate the permits in their entirety, but rather identified the particular provisions, containing particular management commands, that Southwest was alleged to have violated by not developing and implementing legally adequate SWPPP, SWMP, and BMP plans. As the District Court recognized, where the alleged violation consists of the failure to perform a required act (such as the failure to prepare and implement legally sufficient environmental compliance plans), it is impossible to describe the activity that constitutes the alleged violation with the same specificity that might be used when describing an affirmative act (such as engaging in or permitting a specific illegal

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(Pet. App. 35a). Consistent with these allegations, the District Court found not only housekeeping violations, but inspection, reporting, record keeping, and responsive action violations. Pet. App. 65a-66a.

The Court of Appeals focused on the "good housekeeping" provision only because, as the Court noted, *Petitioner* had specifically contested the District Court's jurisdiction to consider Respondents' allegations of "poor housekeeping" on the ground that their notice letter had not sufficiently alleged any violation in this regard. Pet. App. 15a. The Court of Appeals then observed that Petitioner had conceded in its appellate brief that the District Court's reference to "poor housekeeping" (see Pet. App. 66a) did "arguably correspond" to Respondents' reference to storm water controls and "good housekeeping" requirements in Attachment 2 of the notice letter. Pet. App. 15a.

discharge). Pet App. 104a; *see City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 906-08 (S.D.N.Y. 1995).

On the particular facts of this case, then, the Court of Appeals affirmed the District Court's conclusion that Respondents' notice letter – especially its allegation that Petitioner had failed to prepare and implement a SWPPP containing the "good housekeeping" provisions required by Southwest's 1992 General Industrial NPDES permit – described "the activity alleged to constitute a violation" (40 C.F.R. § 135.3(a)) with sufficient specificity to satisfy the requirements of the Clean Water Act. Petitioner can cite no decision from this or any other federal court suggesting that the Court of Appeals erred in this conclusion.

B. Petitioner's Concession That Respondents' Letter Provided Legally Sufficient Notice of How The Pollution Plans Needed To Be Reformed Is Completely At Odds With Its Implementation Argument Before This Court

Petitioner argues that "the specific standard, limitation, or order alleged to have been violated" and "the activity alleged to constitute a violation" must be interpreted to constitute separate notice requirements under 40 C.F.R. § 135.3(a). Pet. at 11. True as that may be, there is no reason why a reference in a notice letter to the "standard" that has been violated cannot also satisfy the requirement to describe the "activity" giving rise to the violation. This is especially true where, as here, the narrative requirements of Southwest's General Industrial Permit set forth not generic recitations of law but rather

specific management commands to which the shipyard must adhere using appropriate technology. In large measure, the proscribed activity is the very failure to adhere to the permit provisions themselves. Thus, to assert that the activity constituting the alleged violation can never be described by referencing the underlying legal standard is totally arbitrary and plainly incorrect.

Indeed, although it argued differently in the District Court, Petitioner conceded in the Court of Appeals that Respondents' notice letter *did* allege many of the Clean Water Act violations in sufficient detail so that it could understand and respond to them. Pet. App. 14a.[5] This appellate concession was significant, for if Respondents' notice letter was sufficient to inform Southwest of which provisions of its pollution plans were legally inadequate and how they needed to be fixed, there is no logical

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[5] In the District Court, Southwest attacked the sufficiency of the notice as to both the plan *preparation* and *implementation* violations, seeking to have Respondents' entire lawsuit dismissed. Pet. App. 99a-107a. It was only after the District Court found following trial that Petitioner's stormwater prevention plans had been brought into compliance "despite early deficiencies" (Pet. App. 65a) that Southwest conceded on appeal that, as to the plan *preparation* violations, the notice letter *did* sufficiently describe both the alleged standards violated and the activities constituting the violation. Appellant's Reply Brief at 7 ("It was apparent from the Notice Letter how defendants could cure the alleged deficiency."). Ironically, in this Court Southwest now *heralds* Respondents' plan preparation violation notice and the shipyard's laconic response to it as the very model of proper citizen-suit Clean Water Act procedure. Pet. at 16-17 n.4 (describing the notice letter and responsive actions taken by Southwest as an illustration of "how the citizen suit process is supposed to work.").

reason why Southwest should not likewise have understood what was needed to properly *implement* the identical provisions of those plans so as to effectively reduce the shipyard's pollution. The requirements to *prepare* an adequate pollution prevention plan and then to *implement* it properly are intimately related. *See* Pet. App. 13a. In fact, Southwest's environmental coordinator recognized precisely this fact, acknowledging at trial that upon receiving Respondents' notice letter, Southwest responded by examining *both* the provisions of its pollution prevention plans *and* the manner in which those plans were being implemented:

> We read it in detail several times. We looked at the references that the Notice Letter referred to, both in the Code of Federal Regulations and the California Storm Water Permit Regulations, requirements, and based on that, we compared it to the existing permit, the MPDS [sic] permit, and the storm water permit, *and the practices that we understood were being implemented at Southwest Marine.*

SER 1167 (emphasis added).

Having belatedly conceded that it understood what was wrong with its pollution prevention plans as written, Petitioner also should have understood (and actually did understand) how to implement those same provisions properly.

C. Petitioner Put Its Subjective Understanding of the Notice Letter In Issue And, In Any Event, Mischaracterizes the Court of Appeals' Use of That Evidence

Petitioner faults the Court of Appeals for allegedly "holding that a vague notice letter can be cured by extrinsic evidence of the defendant's reaction." Pet. at 16. As is evident from a review of the opinion, however, the Court of Appeals held no such thing. Rather, the Court merely observed as an evidentiary matter – and once again, only in response to Petitioner's own tender of that issue – that Southwest had obviously been able to understand the nature of at least some of the violations alleged in the notice letter, because it had proceeded to make substantial changes to its facility and operations, admittedly in an attempt to remedy some of the inadequacies identified by Respondents. Pet. App. 16a. The Court of Appeals never held as a legal principle that an otherwise impermissibly vague notice letter can be "cured" or "supplemented" by reference to any subsequent remedial actions taken by the defendant (*see* Pet. at 16); the Court simply noted as an evidentiary matter that Petitioner's response to Respondents' notice letter made clear that it was perfectly capable of understanding the nature of the violations alleged therein and the actions required to remedy them. Pet. App. at 16a.

The Court of Appeals was fully justified in considering this evidence as it related to the credibility of Petitioner's trial and appellate contentions regarding the shipyard's actual understanding of Respondents' letter. Both in the District Court and on appeal, Southwest put its post-notice conduct in issue, arguing not only that the

notice letter was facially deficient but that Petitioner was *subjectively unable to understand the letter. See* ER 1904-05 and 1911 (testimony of CEO Ewing); Appellant's Opening Brief at 41-42 and n.12. To this day, Southwest continues to assert, albeit unconvincingly, that the substantial changes it made to its pollution prevention plans were not "in response to" Respondents' notice letter, but that "NPDES permit holders like petitioner have complex environmental systems in place and are constantly reevaluating and seeking to improve them." Pet. at 17; *see also* Appellant's Opening Brief at 67, fn. 22.

Be that as it may, the critical point is that Petitioner lost this factual dispute in the courts below, and there was nothing improper about the Court of Appeals' considering Petitioner's remedial actions as further evidence of the adequacy of Respondents' notice. The District Court specifically found that the improvements to the shipyard's pollution prevention operations "were prodded in significant measure by this lawsuit." Pet. App. 60a. Southwest's own environmental compliance officer admitted as much on cross-examination (SER 1238-1242), completely contradicting the contrary testimony of Southwest's CEO. ER 1911. Having itself raised and presented evidence on this issue, Petitioner cannot now complain that the Court of Appeals considered the very evidence of post-notice conduct that it urged the court to consider, and that the Court viewed that evidence as corroboration that Respondents' notice was in fact understandable and adequate under the law. Pet. App. at 16a; *Atlantic States Legal Foundation v. Stroh Die Casting Co.*, 116 F.3d 814, 819-20 (7th Cir.), *cert. denied*, 522 U.S. 981 (1997) (concluding that notice was sufficient based in part

on remedial actions taken by the recipient after notice was received).

D. The Court of Appeals' Opinion Is Fully Consistent With This Court's Precedents Holding That the Citizen Suit Notice Requirements in Federal Environmental Laws Must Be Strictly Construed in Order to Serve Important Statutory Purposes.

Recognizing that the Court of Appeals' decision below creates no conflict among the circuits or with any statutory or regulatory provision regarding the issue of adequate notice, Petitioner tries to manufacture a conflict between the Court of Appeals' ruling and this Court's decisions in *Hallstrom* and *Gwaltney*. But there simply is no conflict. To the contrary, the Court of Appeals explicitly addressed those decisions, rendering a decision that was fully consistent not only with this Court's precedents, but with the underlying objectives Congress sought to achieve in imposing the statutory 60-day notice requirement.

Neither *Hallstrom* nor *Gwaltney* even remotely addresses the question of how much detail is required with respect to the *content* of a citizen suit notice letter. The Court's decision in *Gwaltney* did not involve the issue of pre-suit notice *at all*, but was instead concerned with whether citizen suits could be brought under the Clean Water Act to remedy wholly past violations of law. In holding that citizen-plaintiffs must allege a state of either continuous or intermittent violations in order to confer

federal jurisdiction, the Court relied in part on the language and structure of the Clean Water Act's notice provision, which the Court found was intended to give the alleged violator an opportunity to bring itself into complete compliance with the Act and thus make a citizen suit unnecessary – a purpose that would be rendered meaningless if citizen suits for wholly past violations were permitted. *Gwaltney*, 484 U.S. at 60. Beyond this general reference to the congressional intent underlying the notice provision, however, *Gwaltney* contains no discussion of the scope of the 60-day notice requirement.

Hallstrom, by comparison, does address the consequence of a wholesale failure to provide *any notice at all* to the relevant government enforcement agencies before a citizen suit is filed, holding that under the plain language of RCRA, the 60-day notice provision must be deemed to be a mandatory condition precedent for suit and may not be disregarded at a court's discretion. *Hallstrom*, 493 U.S. at 31. As the Court of Appeals in the present case recognized, however, the plaintiffs in *Hallstrom* had failed to comply with the facial requirements for notice set out in the applicable statute by providing no notice whatsoever to the relevant state and federal government agencies. The *Hallstrom* opinion said nothing about the specificity with which the offending activity must be described in a notice letter pursuant to 40 C.F.R. § 135.3(a), the issue presented in this case. *See* Pet. App. 17a-18a.[6]

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[6] Although neither *Gwaltney* nor *Hallstrom* address the issue of what constitutes an adequate notice under the applicable regulations, other courts *have* discussed this very issue in circumstances quite similar to those of this case. In

The conflict that Petitioner tries to manufacture is thus nonexistent. The Court of Appeals below expressly referred to this Court's decision in *Hallstrom*, emphasizing that "the CWA's notice requirement is strictly construed and that compliance with the notice requirement is a prerequisite to a citizen enforcement action." Pet. App. 17a-18a. The Court of Appeals likewise made explicit reference to *Gwaltney*'s holding that the CWA "does not permit citizen suits for wholly past violations," finding that Respondents had satisfied "*Gwaltney*'s threshold requirement for jurisdiction" by making a good-faith allegation of continuous or intermittent violations. *Id.* at 18a. There is simply no basis for Petitioner's assertion of a conflict between the opinion below and this Court's decisions in *Gwaltney* and *Hallstrom*.

Anglebrook, 891 F. Supp. at 901-02, 907, the district court considered the adequacy of notice for bringing a citizen suit under a storm water pollution prevention plan, and held that a notice letter alleging the defendant's "failure to insure maintenance of water quality standards in downstream waters," its "failure to describe appropriate controls and measures to be implemented at the construction site," and its "failure to describe storm water management controls" contained "an adequate statement of the activity that constitutes the violation." *See also Defenders of Wildlife v. Ballard*, 73 F. Supp. 2d 1094, 1097 (D. Az. 1999) (upholding adequacy of notice under Endangered Species Act). The District Court here appropriately followed *Anglebrook*, concluding that as in that case, Respondents' notice letter was adequate because it specifically identified the particular standards that Petitioner's pollution control plans allegedly violated, as well as the prohibited actions and the regulations and NPDES permit provisions for each alleged violation. Pet. App. 103a-105a.

To the contrary, it is Petitioner's insistence on achieving an unattainable precision and specificity in the content of a 60-day notice letter that would pose a conflict with this Court's precedents and contravene congressional intent. As this Court recognized in *Hallstrom*, the legislative history of the citizen suit notice provision "indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 493 U.S. at 29. To that end, Congress directed that the notice provisions must not place "impossible or unnecessary burdens on citizens *but rather should be confined to requiring information necessary to give a clear indication of the citizens' intent.* These regulations might require information regarding the identity and location of the alleged polluter, *a brief description of the activity alleged to be in violation*, and the provision of law alleged to be violated." S. Rep. No. 92-414 at 80, 92d Cong. 1st Sess. (1971), 1972 U.S. Code Cong. & Admin. News 3668, 3745 (emphasis added). Petitioner's interpretation of the EPA's implementing regulations would not only supplant "the compromise struck by Congress" in adopting the citizen suit notice provision, *Hallstrom*, 493 U.S. at 29, but would undermine the entire purpose of the Clean Water Act as the primary vehicle for preventing and reducing pollution of the waters of the United States.[7]

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[7] Petitioners' contrary suggestion – that the Court of Appeals' decision will somehow result in a flood of frivolous "fishing expedition" citizen suits – is nothing short of fanciful. Federal courts have long possessed the wherewithal to deal with cases that are factually unsupportable. If Respondents'

In sum, the Court of Appeals and the District Court properly followed the teachings of *Hallstrom* and *Gwaltney* that the judicial interpretation of what is demanded by the notice regulation must not run afoul of the legislative purposes expressed by Congress in enacting the statutory notice requirement. The decisions below are fully consistent with this Court's precedents and Congress' intent. The petition for a writ of certiorari should be denied.

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case had been devoid of merit, it would have been thrown out at the summary judgment stage, if not earlier. *See* Pet. App. 77a-98a (District Court decision denying Petitioner's motion for summary judgment); *id.* 99a-107a (District Court decision denying Petitioner's motion to dismiss). These same mechanisms for achieving the prompt dismissal of non-meritorious actions would be available to any defendant in a citizen suit brought under the Clean Water Act. Moreover, there are significant financial and practical barriers that serve to discourage private citizens from initiating enforcement actions in the absence of a well-founded belief that the defendant is presently violating the environmental laws in a known manner; few individuals or organizations can afford to bear the cost and financial risks of years of litigation based upon the mere hope that they may ultimately discover that some initially-unknown violation has been committed.

II. THE COURT OF APPEALS PROPERLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS EQUITABLE DISCRETION BY MANDATING THAT PETITIONER TAKE CERTAIN SPECIFIC REMEDIAL ACTIONS THAT WERE COMPLETELY CONSISTENT WITH, AND COMPLEMENTARY TO, ITS EXISTING PERMIT REQUIREMENTS

A. The Clean Water Act Does Not Divest Federal Courts of Their Traditional Equitable Powers To Order Relief Necessary to Achieve Compliance With the Act.

Petitioner challenges the scope of the remedial injunction that was issued by the District Court and upheld by the Court of Appeals, arguing in bold strokes that the Clean Water Act places all discretionary decision-making regarding compliance with the Act's standards in the hands of federal and state regulators, and that "courts cannot be permitted to interfere with that regulatory structure under the guise of common law rulemaking or the exercise of equitable discretion." Pet. at 19. On this point, Petitioner misstates both the reach of the courts' equitable powers under the Clean Water Act and the scope of the injunction entered by the District Court below: The courts' remedial authority is not as constrained as Petitioner suggests, and the injunction issued in this particular case is not nearly so broad and far-reaching as Petitioner complains.

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Co. v.*

Bowles, 321 U.S. 321, 329 (1944). This Court specifically considered the scope of Clean Water Act remedies in *Weinberger*, 456 U.S. 305, noting that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.* at 313 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). The Court held that the Clean Water Act "permit[s] the exercise of a court's equitable discretion, whether the source of pollution is a private party or a federal agency, to order relief that will achieve compliance with the Act." *Weinberger*, 456 U.S. at 318.

More recently, in *Friends of the Earth*, 528 U.S. at 193, this Court reaffirmed that under the citizen suit provision of the Clean Water Act, "the district court has discretion to determine which form or relief is best suited, in the particular case, to abate current violations and deter future ones." *Accord, Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994) (district courts have "broad latitude in fashioning equitable relief when necessary to remedy an established wrong"). As the Court of Appeals recognized in its opinion below, that is precisely what the District Court did in this case, exercising its discretion to fashion the terms of a narrowly crafted injunction that it deemed necessary to abate Petitioner's ongoing violations of the Act and to deter future violations. Pet. App. 22a-25a.

Petitioner argued strenuously below that the District Court, upon finding that a condition of its NPDES permit had been violated, could do no more than issue an order reciting the terms of that particular permit requirement

and ordering Petitioner to comply with the provision.[8] *See* Pet. App. at 22a. The Court of Appeals quite properly disagreed, noting that "a district court's equitable authority is not so cramped." *Ibid.* Rather, the Court explained, "[s]o long as the district court's equitable measures are reasonably calculated to 'remedy an established wrong,' they are not an abuse of discretion." *Id.* at 22a-23a (quoting *Alaska Center*, 20 F.3d at 986).

Southwest's reliance upon this Court's decisions in *City of Milwaukee*, 451 U.S. 304, and *Ouellette*, 479 U.S. 481, is totally misplaced. *See* Pet. at 19-21. As this Court made clear in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), those decisions both dealt with the issue of the Clean Water Act's preemption of common law remedies for the abatement of nuisances caused by water pollution. In *City of Milwaukee*, this Court held that in enacting the Clean Water Act, Congress had intended to occupy the field of

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[8] There is no small irony in Petitioner's contention that the terms of the District Court's injunction must be limited to reciting and ordering compliance with the specifically-identified permit provisions. This is the same party, after all, that in the first argument of its certiorari petition insists that a notice letter that merely recites the language of the permit provision that is alleged to have been violated is so vague and meaningless that it provides the defendant with no "opportunity to bring itself into complete compliance with the Act." Pet. at 14 (quoting *Gwaltney*, 484 U.S. at 60). Petitioner does not explain why the same language that, in the context of the notice letter, is allegedly so unfathomable that Petitioner would not even know what remedial actions were being demanded of it should now suddenly be held to provide such sufficient guidance that the District Court must rely upon that language – and that language alone – to ensure compliance with the Act.

water pollution control and had preempted the federal common law of nuisance in that regard; accordingly, "there is no basis for a federal court to impose more stringent limitations than those imposed under the regulatory regime *by reference to federal common law.*" *City of Milwaukee*, 451 U.S. at 320 (emphasis added). Similarly, in *Ouellette*, this Court held that the Clean Water Act also preempts the common law of an affected state, at least to the extent that such common law seeks to impose liability for an interstate discharge from a point source in another state; the Court reiterated its concern that allowing lawsuits based upon common-law rules established by the different states would undermine the congressional scheme and subject discharge sources to "nuisance standards [that] often are 'vague' and 'indeterminate.' " *Ouellette*, 479 U.S. at 496.

City of Milwaukee and *Ouellette* thus have no bearing on this case. The District Court did not purport to entertain any cause of action or to issue any injunctive relief based upon the "vague" and "indeterminate" standards of the federal or state common law of nuisance. Rather, as the Court of Appeals recognized, the District Court's injunction was issued under the court's established authority under the Clean Water Act itself to order such relief as it deemed necessary to enforce the terms of Petitioner's NPDES permits and to remedy Petitioner's violations of the Act. The District Court neither abused its statutory discretion in that regard, nor usurped the authority of the executive-branch officials that issued the permits to Petitioner in the first place.

B. The Injunction Entered By the District Court Did Not Override or Exceed the Terms of Petitioner's Existing NPDES Permits, But Merely Enforced Those Permit Requirements By Giving Them Concrete Application in the Face of Petitioner's Continuing Violations of the Law.

Petitioner claims that the District Court "rewrote" and "ratcheted up" the requirements contained in its Clean Water Act permits, thereby usurping the role of the regulatory authorities charged with administering the Act. Pet. at 23. To support this claim, Petitioner disregards and distorts the record below in at least two key respects: (1) the District Court specifically found (in findings that were upheld by the Court of Appeals and that are not challenged by Petitioner in this Court) that Petitioner had violated and was continuing to violate its existing permit requirements, and that those violations had resulted in the contamination of San Diego Bay (Pet. App. 65a-67a); and (2) the injunctive measures imposed by the District Court did not "override" Petitioner's existing permit requirements, but were carefully crafted to give specific definition to, and to compel compliance with, those permit requirements in response to Petitioner's ongoing violations of law.

At the conclusion of the trial on the merits, the District Court found that the evidence showed "shoddy practices" and "a pattern of poor housekeeping" in Petitioner's implementation of its stormwater pollution prevention plans. Pet. App. 66a. Considering the cumulative evidence about Southwest's operations, the District Court found "a picture of overall inadequacies" in Petitioner's implementation of those plans. *Ibid.* The District Court

further found that "the implementation inadequacies have led to significant contributions of pollutants to [Petitioner's] leasehold and, as such, San Diego Bay," and that Petitioner's "failure to implement adequately its required plans has contributed to and perpetuated the contamination of the off-shore leasehold." *Ibid.* The District Court also noted that "[t]rial experts agreed that the off-shore leasehold is 'devoid of life.' " *Ibid.*

To address and remedy these violations, the District Court directed Petitioner to take a series of specific actions, broadly categorized by the court as "specific directives" and "physical plant improvements." *Id.* at 67a-71a. None of these directives, however, "override" Petitioner's governing NPDES permits, much less "usurp" the authority of the regulatory agencies. To the contrary, the District Court's orders give meaning to and enforce the terms of those existing permits by defining the precise activities that Petitioner must undertake to bring itself into compliance with the requirements of its permits and of the Clean Water Act itself. As the Court of Appeals explained – with an illustrative listing of the specific directives ordered by the District Court – all of the injunctive measures ordered by the court "are consistent with, and complementary to, [Petitioner's] existing permit requirements." Pet. App. 23a.[9]

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[9] For example, Petitioner has objected vociferously to the requirement that Southwest capture and divert contaminated stormwater runoff from its piers. *See* Pet. at 22-23; Pet App. 58a, 70a. Yet the evidence showed that Southwest's piers, used as "lay down" areas for heavy material, paints, spent blast grit, and other hazardous wastes, have been a "high risk" and chronic source of stormwater pollution. *See, e.g.*, SER 1195-96

The Court of Appeals was thus certainly correct when it ruled that the District Court acted within its broad equitable discretion under the Clean Water Act in ordering the specific measures it did – injunctive relief that was necessary to abate Petitioner's on-going permit violations and to remedy the polluted conditions in San Diego Bay.[10]

(admission during direct examination of Environmental Manager Austin); SER 1198-1203 (admission during his cross-examination); SER 781-84 (Hazardous Waste Incident Report regarding conditions on piers); SER 785-86 (Internal Memorandum criticizing Hazardous Incident Report as unjustifiably minimizing a serious problem); SER 809 (Letter from Southwest Environmental Compliance Coordinator Best, complaining of persistent disregard for housekeeping BMP on piers). In light of this evidence and the court's findings, the District Court was plainly within its discretion to order Petitioner to capture pier runoff from a five-year storm to abate the ongoing violations and to deter future violations at the shipyard. Pet. App. 38a. Moreover, as the Court of Appeals noted, the pier diversion requirement is "consistent with the [existing permit] requirement that [Petitioner] not discharge storm water that adversely affects the environment or degrades marine communities on [Petitioner's] leasehold, which the district court found had been rendered devoid of life by (among other things) [Petitioner's] discharges." Pet. App. 23a-24a.

[10] Almost as an aside, Petitioner argues that the District Court's imposition of a $799,000 civil penalty was excessive. But this argument also ignores the record. The District Court found that the violations committed by Petitioner were serious, that they perpetuated marine contamination and harmed marine life, that they were continuous throughout the litigation, that Petitioner had benefitted economically from its violations, and that the improvements that Petitioner had made during the course of the litigation were "prodded in significant measure"

CONCLUSION

Petitioner's claimed errors have been unanimously rejected by every judge that has considered them. The decisions of this Court upon which Petitioner attempts to manufacture a conflict simply do not support the arguments it raises. Nor is there any colorable claim to a conflict among the circuit courts of appeals on any material point in this case.

On the merits, the Court of Appeals and District Courts were correct in holding that Respondents' notice letter was adequate and in rejecting Petitioner's hypertechnical interpretation of the citizen suit notice requirements, which would allow the shipyard to escape liability for the severe pollution it has created. The Court of Appeals was likewise correct in upholding the trial court's broad discretion to fashion appropriate injunctive remedies for Petitioner's violations of the Clean Water Act.

In short, the Court of Appeals' opinion creates no new law, contravenes no decision of this or any other

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by Respondents' lawsuit. Pet. App. 52a-54a, 59a-61a. Consistent with its obligations under 33 U.S.C. § 1319(d), the District Court made other findings in mitigation of a more severe penalty. *Id.* at 52a-54a, 59a-61a. The District Court's penalty assessment was based upon substantial evidence in the record and fell well within the range of the court's discretion. Moreover, as Petitioner acknowledges (Pet. at 28), the District Court held that the civil penalty could be offset by the cost of Petitioner's implementation of the injunctive remedial measures ordered by the court. Pet. App. 60a-61a. As the Court of Appeals noted, this offset provision likely renders Petitioner's protestations a moot point. Petitioner has no legitimate basis for complaint.

federal court, and addresses no questions of national significance. The Court's decision is instead peculiar to the unique facts of Petitioner's shipyard facility and the narrative provisions of its permits. There is certainly no danger of "transforming the administration of Clean Water Act" if the Court of Appeals and District Court decisions are left to stand. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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